Ng Chee Keong v Matad Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S5-22-94 OF 1997
JAMES FOONG J
31 MARCH 1998

Contract *— Sale and purchase of land — Claim for commission as introduction fees — Whether plaintiff was indeed introducer — Whether there was an agreement to pay plaintiff for initial introduction or for subsequent undertakings which the plaintiff failed to deliver — Whether agreement to pay commission void by virtue of s 22C(1)(d) of the Valuers, Appraisers and Estate Agents Act 1981 and s 24 of the Contracts Act 1950*

Agency *— Rights of agent — Commission — Estate agent — Plaintiff introduced land to defendant who entered into sale and purchase agreement with vendor — Whether plaintiff an estate agent as defined under s 2 of the Valuers, Appraisers and Estate Agents Act 1981 — Whether limitation on fees in s 22C(1)(d) of the Valuers, Appraisers and Estate Agents Act 1981 applied to the plaintiff — Valuers, Appraisers and Estate Agents Act 1981 ss 2 & 22C*

On 1 July 1991, the defendant entered into a sale and purchase agreement ('the agreement') with a company known as JC and MC Sdn Bhd ('the vendors') for the purchase of some pieces of land ('the land') for a consideration of RM42,562,280. At the time of the signing of the agreement, only 50% of the purchase price was paid to the vendors. Under cl 11 of the agreement, it was agreed that in the event that the balance purchase price was not paid within a year thereof, the defendant would be entitled to enter into a joint venture agreement with another interested purchaser on an equal equity basis. The defendant failed to pay in time and the vendors transferred the remaining 50% of the land to its nominees. The plaintiff, an electrical and renovation contractor by profession, asserted that he was responsible for introducing the land to the defendant and it was agreed between the parties that the plaintiff would be entitled to a commission of 1% of the purchase price of the land being RM425,622.80. As the commission promised was not forthcoming, the plaintiff filed this suit in the High Court. The defendant denied this assertion, arguing that the land came through the knowledge of one Khwan Salim ('DW2') who was at the material time the business development director of the defendant. The plaintiff stated that when he first heard of the land, he informed his friend who advised him to approach DW2. DW2 in turn informed DW1 — the managing director of the defendant — about the land and this led to the signing of the agreement. A letter dated 26 May 1994 from the defendant to the plaintiff stated that it was the plaintiff who introduced the land to the defendant. The defendant further argued that even assuming the plaintiff was the introducer of the land, it was never agreed that the plaintiff would be paid the commission of RM425,622.80. In this regard, the defendant sought to argue that the letter of 12 June 1995 — wherein an undertaking was given by the defendant for payment of introduction fees of RM452,622.80 to the plaintiff — was conditional upon the successful conclusion of the purchase of the

remaining 50% of the land from the vendors' nominees, whom the defendant was unable to negotiate with directly and had to rely on the plaintiff. In this regard, it was argued that only upon the conclusion of the purchase of the remaining 50% of the land would the plaintiff be entitled to his commission. Finally, the defendant argued that the agreement for payment of commission, even if existing was void and unenforceable in law by virtue of s 22C(1)(d) of the Valuers, Appraisers and Estate Agents Act 1981 ('the Act') and s 24 of the Contracts Act 1950.

Held, allowing the claim:

(1) DW2 may not have been a director of the defendant, but by the description of his designation, which was associated with a senior position of management, it was evident that DW2 was working for the defendant. In the capacity of a servant and/or agent of the defendant, the information on the land when disclosed to him by the plaintiff must be taken to have been received by the defendant. In any event, the defendant had vide the letter of 26 May 1994 admitted that the plaintiff first introduced it to the land (see p 195C–D).

(2) The letter of undertaking dated 12 June 1995 pertained exclusively to the original sale and the figures mentioned therein pertained exactly with the initial purchase price and was not related to the endeavours by the plaintiff to purchase the balance of the 50% of the land for the defendant. DW1 was a shrewd businessman and would not have made mistakes, as alleged, in the sums to be paid to the plaintiff unless it was considered, ascertained and checked and from the said letter, it was clear that the defendant had intended to pay the plaintiff his due commission for introducing the land at the initial stage and not for the subsequent efforts expended as claimed by the defendant (see p 197B–D).

(3) In relation to the interpretation of s 22C(1)(d) of the Act, the first factor to be deliberated was whether the plaintiff had acted or held himself out to the public as ready to act for reward as an agent for the sale, disposal purchase or acquisition of landed properties. Thereafter, for the restriction under the section to apply, it must be shown additionally that claim for entitlement for fees, charges and renumeration sought were pursuant to any professional advice or services rendered by the plaintiff as an estate agent.

In the present situation, the plaintiff only mentioned the availability of the land to his good friend En Hakkim who then referred him to the defendants. The disclosure was very discreet and only confined to two persons. It was a private conversation and not announced to the public at large or published and circulated in the open. As such, the plaintiff had not acted or held himself out to the public as ready to act for reward in introducing the land for sale.

In respect of the second factor, the plaintiff was not a qualified person under Pt III of the Act and his only knowledge was in respect of the existence of the land for sale and that he could put a prospective purchaser in contact with the vendors. This did not qualify the plaintiff as having rendered professional advice or services as an estate agent under the Act. In order to do that, it must be shown that the plaintiff had knowledge of the trade, treated it as a profession and was constantly involved in such an activity making it a means to support his livelihood. In the absence of all these factors, the restrictions imposed by virtue of s 22C(1)(d) of the Act were inapplicable to the plaintiff (see pp 199H–I and 200B–H).

Per curiam:

The heading of s 22C of the Act refers to restrictions on estate agent practice. Hence, a person whose action did not fall within the definition of 'estate agency practice' would not be prevented by the prohibition in this section. In this regard, the approach enunciated by the moneylending cases in considering the activities of a person to determine his position has much relevance to the application of the provision of the Act (see p 199E).

[Bahasa Malaysia summary

Pada 1 Julai 1991, defendan telah mengikat satu perjanjian jual beli ('perjanjian tersebut') dengan sebuah syarikat yang dikenali sebagai JC and MC Sdn Bhd ('penjual-penjual') bagi pembelian beberapa bidang tanah ('tanah tersebut') bagi satu balasan sebanyak RM42,562,280. Pada waktu menandatangani perjanjian tersebut, hanya 50% daripada harga belian telah dibayar kepada penjual-penjual. Di bawah fasal 11 perjanjian tersebut, ia telah dipersetujui bahawa sekiranya baki harga belian tidak dibayar dalam tempoh setahun daripada tempoh tersebut, defendan akan berhak untuk mengikat satu perjanjian usahasama dengan pembeli lain yang berminat atas dasar ekuiti yang sama. Defendan telah gagal membayar pada masanya dan penjual-penjual telah memindahkan baki 50% tanah tersebut kepada penerima namaannya. Plaintif, yang merupakan kontraktor elektrik dan pengubahsuaian, menegaskan bahawa beliau bertanggungjawab memperkenalkan tanah tersebut kepada defendan dan telah dipersetujui antara pihak-pihak bahawa plaintif akan berhak kepada komisyen sebanyak 1% dari harga belian tanah tersebut yang merupakan sebanyak RM425,622.80. Oleh kerana komisyen yang dijanjikan tidak diterima, plaintif telah memfailkan guaman ini di Mahkamah Tinggi. Defendan telah menafikan penegasan ini, dengan berhujah bahawa tanah tersebut diketahui melalui seorang yang bernama Khwan Salim ('DW2') yang mana pada waktu yang material itu merupakan pengarah pembangunan perniagaan defendan. Plaintif telah menyatakan bahawa ketika beliau pertama kalinya mengetahui mengenai tanah tersebut, beliau telah memaklumkan kepada rakannya

yang telah menasihatkan beliau supaya mendekati DW2. DW2 sebaliknya telah memaklumkan DW1 — pengarah urusan defendan — mengenai tanah tersebut dan ini membawa kepada perjanjian tersebut ditandatangani. Sepucuk surat bertarikh 26 Mei 1994 daripada defendan kepada plaintif menyatakan bahawa plaintif merupakan pihak yang telah memperkenalkan tanah tersebut kepada defendan. Defendan selanjutnya berhujah bahawa sungguhpun dianggarkan plaintif adalah pengenal bagi tanah tersebut, ia tidak pernah dipersetujui bahawa plaintif akan dibayar komisyen sebanyak RM452,622.80. Sehubungan dengan perkara ini, defendan cuba untuk berhujah bahawa surat bertarikh 12 Jun 1995 — di mana satu akujanji telah diberikan oleh defendan untuk pembayaran yuran pengenalan sebanyak RM452,622.80 kepada plaintif — adalah bersyarat atas keputusan kejayaan pembelian baki 50% daripada tanah tersebut daripada penerima namaan penjual-penjual, dengan siapa defendan telah tidak berjaya untuk berurusan secara langsung dan terpaksa bergantung pada plaintif. Berhubung dengan perkara ini, telah dihujahkan bahawa plaintif berhak kepada komisyen beliau hanya selepas keputusan pembelian baki 50% dari tanah tersebut. Akhirnya, defendan berhujah bahawa perjanjian untuk pembayaran komisyen, meskipun ia wujud adalah tak sah dan tidak boleh dikuatkuasakan di sisi undang-undang disebabkan s 22C(1)(d) Akta Penilai, Pentaksir dan Ejen-Ejen Hartanah 1981 ('Akta tersebut') dan s 24 Akta Kontrak 1950.

Diputuskan, membenarkan tuntutan:

(1) DW2 mungkin bukannya merupakan seorang pengarah defendan, tetapi menurut penjelasan jawatannya, yang dikaitkan dengan kedudukan pengurusan kanan, adalah jelas bahawa DW2 bekerja untuk defendan. Dalam keupayaan sebagai pekerja dan/atau ejen defendan, maklumat mengenai tanah tersebut apabila dimaklumkan kepada beliau oleh plaintif semestinya dianggapkan sebagai telah diterima oleh defendan. Dalam sebarang keadaan, defendan melalui surat bertarikh 26 Mei 1994 telah mengakui bahawa plaintif telah pertama kalinya memperkenalkan kepada tanah tersebut kepadanya (lihat ms 195C–D).

(2) Surat akujanji bertarikh 12 Jun 1997 secara eksklusifnya adalah berkaitan dengan penjualan asal dan angka-angka yang disebut di dalamnya adalah berkaitan secara tepatnya dengan harga belian awal dan tidak dikaitkan dengan usaha-usaha oleh plaintif untuk membeli baki tanah tersebut sebanyak 50% untuk defendan. DW1 merupakan seorang peniaga yang teliti dan tidak mungkin membuat kesilapan, sepertimana yang didakwa, berhubung dengan jumlah yang harus dibayar kepada plaintif melainkan ia telah dipertimbangkan, ditentukan dan disemak dan daripada surat tersebut, adalah jelas bahawa defendan telah berniat untuk membayar kepada plaintif komisyen yang kena dibayar itu kerana memperkenalkan tanah tersebut pada peringkat awal dan bukan

kerana usaha-usaha kemudiannya yang telah dihabiskan sepertimana yang dituntut oleh defendan (lihat ms 197B–D).

(3) Berhubung pentafsiran s 22C(1) Akta tersebut, faktor pertama yang harus ditentukan adalah sama ada plaintif telah bertindak atau mengemukakan dirinya kepada masyarakat awam sebagai seseorang yang bersedia untuk menerima ganjaran sebagai ejen bagi penjualan tersebut, pelupusan, pembelian atau pengambilan hartanah dalam bentuk tanah. Selepas itu, untuk sekatan di bawah seksyen tersebut terpakai, ia mestilah ditunjukkan secara tambahan bahawa tuntutan untuk keberhakan bagi yuran, bayaran dan gaji yang dipohon adalah menurut mana-mana nasihat profesional atau perkhidmatan-perkhidmatan yang telah diberikan oleh plaintif sebagai ejen harta hartanah.

Dalam keadaan semasa ini, plaintif hanya menyebut mengenai adanya tanah tersebut kepada rakan baiknya En Hakkim yang kemudiannya telah merujuk beliau kepada defendan-defendan. Pendedahan tersebut adalah secara rahsia dan hanya terhad kepada dua orang sahaja. Ia merupakan suatu perbualan persendirian dan tidak dimaklumkan kepada orang awam secara menyeluruh atau diterbitkan dan diedarkan di khalayak ramai. Oleh yang demikian, plaintif telah tidak bertindak atau mengemukakan dirinya kepada orang awam sebagai seorang yang bersedia untuk bertindak dengan mendapat ganjaran dalam memperkenalkan tanah tersebut untuk jualan.

Berhubung faktor kedua, plaintif bukannya seorang yang berkelayakan di bawah Bah III Akta tersebut dan pengetahuan beliau adalah hanya berhubung dengan kewujudan tanah tersebut untuk jualan dan bahawa beliau boleh menemukan bakal pembeli dengan penjual-penjual. Ini tidak melayakkan plaintif sebagai telah memberikan nasihat atau perkhidmatan profesional sebagai ejen hartanah di bawah Akta tersebut. Untuk melakukan sedemikian, ia mestilah ditunjukkan bahawa plaintif berpengetahuan mengenai perniagaan tersebut, menganggapkannya sebagai satu profesyen dan sentiasa melibatkan diri dalam kegiatan yang sedemikian menjadikannya satu sumber untuk menyara kehidupannya. Dalam ketiadaan kesemua faktor ini, sekatan yang dikenakan menurut s 22C(1)(d) Akta tersebut adalah tidak terpakai kepada plaintif (lihat ms 199H–I dan 200B–H).

Per curiam:

Tajuk s 22C Akta tersebut merujuk kepada sekatan ke atas amalan ejen hartanah. Dengan itu, tindakan seseorang yang tidak terlingkung dalam tafsiran 'amalan ejen hartanah' tidak akan terhalang oleh larangan dalam seksyen ini. Sehubungan dengan perkara ini, pendekatan yang disebut dengan jelas oleh kes-kes pinjaman wang dalam mempertimbangkan kegiatan-kegiatan seseorang untuk menentukan kedudukannya mempunyai perkaitan kepada pemakaian peruntukan Akta tersebut (lihat ms 199E).]

Notes

For cases on the right of an agent for commission, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 659–662.

Cases referred to

Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9 (refd)

Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14 (refd)

Legislation referred to

Contracts Act 1950 s 24
Moneylenders Act 1951 ss 2, 15
Valuers, Appraisers and Estate Agents Act 1981 ss 2, 22C(1)(d)

Daya Nair (*Nik Saghir & Ismail*) for the plaintiff.
Ng Liew Sim (*Sothi & Ang*) for the defendant.

James Foong J: On 1 July 1991, the defendants, as purchasers entered into a sale and purchase agreement ('the agreement') with a company known as JC and MC Sdn Bhd ('the vendors') to purchase some lands in the Mukim of Serendah, Selangor ('the land') for a sum of RM42,562,280.

Arising from this, the plaintiff claims that the defendants have agreed to pay him a commission of 1% of the purchase price under the agreement, which is RM425,622.80, for introducing the land to the defendants for purchase.

The defendants deny this. They put forth three defences. Firstly, they deny that the plaintiff was the person who introduced the said land to them. Secondly, if the plaintiff was the introducer, they had not agreed to pay him a commission of RM425,622.80. Thirdly, in the alternative, if the defendants had agreed to pay the plaintiff a commission of RM425,622.80, this agreement is void and unenforceable in law.

The first issue

The first issue to be determined is whether the plaintiff was the person who introduced the land to the defendants for purchase.

According to DW1, the executive chairman and the person in charge of the affairs of the defendants, the land was first brought to his attention by one En Khwan Salim (DW2). In fact, according to DW1, he had not even met the plaintiff before the execution of the agreement.

This was of course challenged by the plaintiff. He explained that when he became aware that the land was for sale he approached a good friend of his by the name of En Hakkim. Hakkim advised him to see his brother, DW2 whose company was then interested to invest in landed properties. This was done, leading eventually to DW2 informing DW1 of the availability of this land.

A These facts are not denied by the defendants. But under such circumstances, who can be considered as the introducer within the context of a person offering such services in return for a remuneration, the plaintiff or DW2?

It was brought to the attention of this court that in a letter by the B defendants dated 2 December 1994 (p 8 of encl 29), DW2 is described as their 'Business Development Director'. Despite vigorous attempts by the defendants to convince me that the interpretation of this description does not mean that he was a member of the defendants, I am inclined to think otherwise. He may not have been a company director of the defendants, but by the description of his designation, which is associated to a senior C position of management, I find that he was working for the defendants. In the capacity of a servant and/or agent of the defendants, the information on the land disclosed to him by the plaintiff must be considered to be received by the defendants. Thus when DW1 was subsequently informed of this land by DW2, the defendants already had knowledge that this land D was for sale; and this information was derived from the plaintiff.

In any event, besides this, the defendants have by letter dated 26 May 1994 (p 3 of encl 29) explicitly admitted that 'it was you (the plaintiff) who first introduced the property to us'.

Though I have established that the plaintiff was the first person who E introduced the land to the defendants for purchase, for completeness, I shall also deal with the DW1's claim that he had not met the plaintiff until after the agreement was signed.

DW1 revealed that he got married in Jakarta before the agreement was dated. For this, a wedding ceremony was held there. And who turned up at this wedding ceremony? The plaintiff. I find it quite extraordinary that F if the plaintiff had not known DW1 prior to the wedding he would travel all the way to Jakarta — uninvited. The plaintiff must have been known to DW1, and attended the wedding as an invited guest of his; and all this took place before the date of the agreement.

Next, we have the fortification by DW2 who candidly acknowledged G that the plaintiff had attended negotiations in the presence of DW1 with the vendors before the purchase of the land was concluded.

With such divulgence, I find absolutely no merit in DW1's claim that he did not know the plaintiff before the agreement was executed.

H *The second issue*

The second issue to be decided is whether there was an agreed sum of RM425,622.80 for commission to be paid by the defendants to the plaintiff for this introduction.

I On this, the plaintiff relied extensively on a letter (the letter of undertaking) by the defendants to him dated 12 June 1995 (p 7 of encl 30). It embodies the following:

> This is to certify that we undertake to pay you 1% of the total purchase price of RM42,562,280 amounting to RM425,622.80 being your introduction fees for the purchase of the above property.

The defendants strenuously attempted to explain out of such commitment. In their statement of defence, they have pleaded that this undertaking was issued on a misrepresentation by the plaintiff made in the the course of a negotiation with the vendors' nominees to purchase 50% of the said land, and not for the original purchase.

At this point it is necessary for me to elaborate a little on the sequence of events after the execution of the agreement. The entire purchase price of the land was RM42,562,280, but only half of this was paid by the defendants to the vendors at the time of the signing of the agreement. Under cl 11 of the agreement, if the balance of the purchase price was not paid by the defendants within a year from the date of the agreement, the defendants shall be 'entitled absolutely to enter into a joint venture agreement ('the joint venture agreement') with the purchaser on a fifty-fifty (50%–50%) per cent basis'. The defendants did not pay the balance of the purchase price within the time stipulated, thus effectively became the owners of only 50% of the land. Nevertheless, they were still interested to secure the balance of the 50% from the vendors who had transferred it to their nominees, believed to be Halaman Perdana Sdn Bhd. The intention of the defendants for wanting to purchase the entire land, as disclosed by evidence, was the existence of a potential purchaser for the whole land. To fulfill this desire, the services of the plaintiff was requested as the defendants were having a dispute with the vendors' nominees and were unable to negotiate with them directly except through the plaintiff. The instruction to the plaintiff was to persuade the vendors' nominees to sell their 50% share to the defendants at RM2.50 per square foot. Various alleged inducements, mainly in the form of a percentage in the purchase price for this purchase and subsequent sale to the prospective buyer, was offered to the plantiff. The plaintiff has admitted that he failed in this attempt and to date, the defendants are still unable to conclude this purchase of the other 50% of the land. It is only on these circumstances stated above that the defendants are attempting to convince me that the letter of undertaking which they issued to the plaintiff on 12 June 1995 was for the successful conclusion of the purchase of this 50% share in the land from the vendors' nominees, and not otherwise.

In my opinion, all these are attempts to confuse this court from the truth. The deeper the defendants went, the greater their contradictions. To start off with, in the letter of undertaking itself, a specific figure of RM425,622.80 is mentioned. If this payment was for consideration associated with the defendants' attempt to purchase 50% of the land from the vendors' nominees then the 1% commission which the plaintiff was alleged to be entitled to is only RM243,936 based on the disclosed purchase price of RM24,393,600 calculated at RM2.50 per square foot. Why then is it stated at RM425,622.80, which is exactly 1% of the original purchase price of RM42,562,280? To this, the only explanation DW1 can offer is that he 'is afraid that this is also an error'.

There is also a previous error discovered in the course of DW1's testimony. When questioned as to why he had issued another letter of undertaking to the plaintiff dated 26 May 1994 (p 4 of encl 29) for a similar figure of RM425,622.80 representing 1% of the commission when this was alleged to be consideration for the purchase of again only 50%

share in the land belonging to the vendors' nominees, he admitted that this was a mistake; it should be 1% of RM24,393,600 and not 1% of RM42,562,280.

These blunders have become too much of a coincidence for this court to believe in their truth. Though there were attempts by the plaintiff in assisting the defendants to purchase the balance of the 50% share, this had not been successful and was abandoned by the plaintiff. The letter of undertaking is certainly not related to these endeavours. It pertains exclusively to the original sale. The figure mentioned therein corresponds exactly with the initial purchase price. DW1, from my observation of him and the evidence adduced, is a shrewd businessman and would not have made mistakes on sums of money to be paid out unless after they are considered, ascertained and checked. From the letter of undertaking, I am convinced that the defendants had intended to pay the plaintiff his due commission for introducing the land to the defendants to purchase at the initial stage, and not for any other efforts subsequent to the agreement as claimed.

The third issue

This third issue is primarily based on s 22C(1)(d) of the Valuers, Appraisers and Estate Agents Act 1981 ('the Act'). Section 22C(1)(d) reads as follows:

> (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16 —
>
> (d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

It is not a disputed fact that the plaintiff is and was not at all material times a registered estate agent as specified in the Act. By virtue of s 22C(1)(d) of the Act, the defendants argued that the plaintiff is not entitled to recover the said commission from them since it is a fee or charges or remuneration for professional advice or services rendered as an estate agent. In furtherance of, and in addition thereto, the defendants submitted that their undertaking to pay the plaintiff the agreed sum as commission is void and unenforceable under s 24 of the Contracts Act 1950. This is because the consideration and object of the agreement to pay is unlawful, being forbidden by law, and/or of a nature that, if permitted, would defeat the law.

Miss Nair, counsel for the plaintiff has tried to impress upon me an argument that s 22C(1)(d) of the Act should be akin in its application to that of the Moneylenders Act 1951. As decided by the Federal Court in *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14 at p 16, following an earlier decision in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9:

> The Ordinance (Moneylenders Ordinance) is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business.

Thus, according to her, the plaintiff not being in the business of an estate agent and who was only involved in the sale of this land as a 'one-off

transaction' should be exempted from the penalty as set out under s 22C(1)(d) of the Act. A

In order to consider this proposition, both the Moneylenders Act 1951 and the Act must be examined.

The relevant prohibitive provision of the Moneylenders Act 1951 in respect of recovery of money lent is s 15. It provides as follows: B

> Contract by unlicensed moneylender unenforceable
>
> No contract for the repayment of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable ... .

By the decision of the Federal Court in *Ngui Mui Khin*'s case, a person can only be considered a moneylender if he falls within the definition of 'moneylender' under s 2. This includes: C

> ... every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent; ... . D

Thus, as pronounced by Salleh Abas FJ (as he then was) in his judgment in *Ngui*'s case at p 12: E

> ... the question whether a person is a moneylender or not is one of fact and that our task is to see whether the primary or principal object of his business as distinguished from incidental parts of his business is one of moneylending.

From the above, it is obvious that the approach adopted by the Federal Court is to consider the activities of the person to determine whether he falls within the definition of a 'moneylender' under s 2 of this legislation. F

Now let us examine the respective provisions of the Act. To begin with, 'registered estate agent' is defined as:

> ... a person whose name has been entered under Part III of the Register and to whom an authority to practise has been issued by the Board under section 16; ... . G

But for the definition of 'estate agency practice', the following is spelled out under s 2 of the Act as:

> ... means acting or holding oneself out to the public as ready to act, for a commission, fee, reward or other consideration as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein; ... . H

Let us now peruse the entire provision of s 22C of the Act which is: I

> Restrictions on estate agency practice
>
> (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16 —
>
> (a) practise or carry on business or take up employment under any name, style or title containing the words 'Estate Agent', 'House

A Agent', 'Property Agent', 'Land Agent', 'House Broker', or the equivalent thereto, in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent;

(aa) carry on business or take up employment as an estate agent;

B (b) display any signboard, or use, distribute or circulate any card, letter, pamphlet, leaflet, notice or any form of advertisement, implying either directly or indirectly that he is a registered estate agent;

(ba) offer for sale or invite offers to purchase any land, building and any interest therein irrespective of whether such land, building and interest is located within Malaysia or outside Malaysia:

C Provided that where foreign properties are to be marketed in Malaysia, such offer or invitation shall be made by or through an estate agent practising and residing in Malaysia on behalf of a principal practising or residing outside Malaysia;

(c) undertake any of the work specified in section 22B; or

D (d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

The heading of this section refers to restrictions on estate agency practice. Hence, a person whose action does not fall within the definition of 'estate agency practice' will not be prevented by the prohibitions in this section. E In this sense, I am of the view that only the approach enunciated by the moneylending cases in considering the activity of a person to determine his position has much relevance to the above provision of the Act. But what the activities are must be restricted to those defined under the Act.

In order to determine whether the act of a person is one of an estate F agency practice, the facts of each case must be considered individually. The requirement, as laid down under s 2, is whether the person has acted or held himself out to the public as ready to act for a commission, fee, reward or other consideration as an agent in respect of a sale, disposal, purchase or acquisition of landed properties or any interest thereto or in respect of leasing or letting of such properties or interest thereto. In G addition to this, for the applicability of the prohibition under s 22C(1)(d) of the Act, the claim for the entitlement of fees, charges and remuneration must be restricted to 'for any professional advice or services rendered as an estate agent'.

Though it has been presented to this court that the plaintiff is and was H at all material times engaged in the business of an electrical and renovation contractor, and that this deal was only his one-off transaction, these facts are for consideration in the second limb. The first factor to be deliberated is whether the plaintiff has acted or held himself out to the public as ready to act for reward in this transaction. Thereafter, in the determination of I whether the remuneration he claims relates to professional advice or services rendered as an estate agent, should the facts that he was never involved in this professional activities be taken into account.

In dealing with the first factor, we have to examine the conduct of the plaintiff to find out whether he had had acted or held himself out openly to the public that he could forge the purchase of the land. To pursue this, we have to know what is meant by 'public'.

According to the *New Shorter Oxford English Dictionary*, 'public' is defined as:

> open to all members of the community; not restricted to private use;
>
> open to general observation, sight or knowledge; existing or done openly; accountable to the general public; accessible to all.

In the present situation of our case, from the facts as disclosed, the plaintiff only mentioned the availability of the land for sale to his good friend En Hakkim, who then referred him to the defendants. This disclosure cannot be considered as: having been done openly. It was in fact very discreet. It was restricted and confined to only two persons. It was a private conversation, certainly not opened to all members of the community. There was no announcement of this information to the public at large, nor was it published in any publication circulated in the open. For this, I am convinced that the plaintiff had not acted or held himself out to the public as ready to act for reward in introducing this land for sale.

In respect of the second factor, whether the plaintiff had offered any professional advice or rendered any professional services as an estate agent for the claim of his commission, I shall now consider his actual occupation and his claim of the limited occasion that he had engaged himself in the activity of introducing land for purchase or sale. On these assertions by the plaintiff, there was no contention from the defendants that they are untrue. The plaintiff is not qualified as a person registered under Pt III of the Act. His only knowledge was in respect of the existence of the land for sale and that he could put a prospective purchaser in contact with the vendors. For this, I find that what he did does not qualify him to be within the category of a person who had given professional advice or professional services to the defendants as an estate agent. To be that, there must be a certain degree of professionalism. This encompasses knowledge of the trade, treating it as an occupation, constant involvement in such activity, and making it as a means to support a livelihood. As these elements are absent in this case, I cannot accept that the plaintiff had provided any professional advice or services as an estate agent to warrant a limitation to his claim for his commission under s 22C(1)(d) of the Act.

As I have concluded that the restriction under s 22C(1)(d) of the Act is not applicable to the plaintiff's claim, the defence based on s 24 of the Contracts Act 1950 must naturally fail. There is no consideration or object in the undertaking to pay the plaintiff being unlawful, forbidden by law and/or of a nature that, if permitted, would defeat the law.

Conclusion

As the facts have proved a commission of RM425,628 is due and owing by the defendants to the plaintiff, I accordingly allow the plaintiff's claim on this sum with interest and costs as listed in his statement of claim.

Plaintiff's claim allowed.

Reported by Lew Chee Seong